United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 77-7216

United States Court of Appeals
For the Second Circuit

ASSOCIATED METALS AND MINERALS CORPORATION,
Plaintiff-Appellee-Appellant,

-against-

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Defendant-Appellee,

and

APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,
Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Page

Statement of Facts 1

The Parties 1

Policies issued by Hartford and Appalachian 2

The Action and the Underlying Facts 3

The Decision Below 4

Statement of Questions Presented 4

Argument:

POINT I—Hartford Has An Obligation To Defend Herein 5

POINT II—The Vendors Endorsement In Any Event Makes Associated An Insured. 6

Conclusion 7

CASES CITED:

Allstate Ins. Co. v. Skawiniski, 40 Ill. App. 2d 136, 189 N.E.2d 365 6

Doyle v. Allstate Ins. Co., 1 N.Y. 2d 439 (1956) 5

Goldberg v. Lumber Mutual Cas. Co., 297 N.Y. 148, 153 (1948) 5

Grand Union Co. v. General Accident Fire & Fid., 254 A.D. 274, 4 N.Y.S. 2d 704 5

Lee v. Aetna Casualty and Surety Co., 81 F. Supp. 1008 affd 178 F.2d 750 (2 Cir. 1949) 5

Maryland Casualty Co. v. Turner, 403 F.Supp. 907 (W.D. Okla. 1975) 6

N. Lekas Corp. v. Travelers Ins. Co., 1 A.D. 2d 15, 147 N.Y.S. 2d 60 5

Ross v. Maryland Casualty Co., 11 A.D. 2d 1002, 205 N.Y.S. 2d 951 (1960) 5

Sincoff v. Liberty Mutual Fire Ins. Co., 11 N.Y.2d 386, 230 N.Y.S. 2d 13 6

Sperling v. Great American Indem. Co., 7 N.Y.2d 442, 199, N.Y.S. 2d 442 6

Sucrest Corp. V. Fisher Governor Co., 83 Misc. 2d 394, 31 N.Y.S.2d 927 (1975) 5

Thomas J. Lipton, Inc. v. Liberty Mutual Ins. Co., 34 N.Y.2d 356, 357 N.Y.S. 2d 705 (1974) 7

UNITED STATES COURT OF APPEALS
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HARTFORD ACCIDENT AND INDEMNITY COMPANY,

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and

APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendant-Appellant.

STATEMENT OF FACTS

The Parties

Associated Metals and Minerals Corporation (hereinafter "Associated") is the plaintiff in the Court below and is an appellee herein. Insofar as it would benefit by a determination favorable to appellant and is expected to seek relief similar to that sought by appellant it is also designated as an appellant.

Hartford Accident & Indemnity Co. (hereinafter "Hartford") is one of the defendants in the Court below. It is the primary insurer of Associated and the appellee herein, the Court below having determined that it had no coverage or duty of defense for the instances hereinafter related.

Appalachian Insurance Company of Providence

(hereinafter "Appalachian") is the other defendant in the Court below. It is the umbrella excess insurer of Associated the appellee-appellant herein, the Court below having determined that the Hartford policy not applying to the hereinafter related facts, Appalachian had coverage and the duty to defend.

Policies issued by Hartford and Appalachian

Associated, a corporation incorporated under the laws of the State of New York, has its principal place of business in the State of New York. In the course of conducting its business and to protect itself against legal liability while so engaged, Associated obtained from defendant-appellee Hartford, a Stock Insurance Company incorporated under the laws of and having its principal place of business in the State of Connecticutt, two casualty insurance policies, bearing the policy Nos. 10C653293E and 10C 646637E (collectively called "The Hartford Policy"). Said policies provide comprehensive general liability coverage for all property damage liabilities of up to $100,000.00 incurred by plaintiff its subsidiaries and divisions and required Hartford to defend Associated, at Hartford's expense, in any action or proceeding commenced against Associated for such damages. The Hartford policy was in full force and effect during 1974 and 1975.

As additional protection against liability actions, Associated obtained from Appalachian a stock insurance company incorporated under the laws of and having its principal place of business in, the State of Rhode Island, a Special Risk Policy bearing Policy No. 71097 ("the Appalachian Policy") Said policy provided, in substance, that Appalachian would pay, on behalf of plaintiff-appellee-appellant, all sums in excess of a retained limit of $25,000 up to $10,000,000 which were not otherwise covered by insurance policies, including the Hartford policy, which plaintiff-appellee-appellant shall become legally obligated

to pay as damages because of, among other things, property damage sustained by any person as a result of plaintiffs operations and to defend Associated, at Appalachians expense, in any action or proceeding against "Associated" for such damages. The Appalachian policy was in full force and effect during 1974 and the first four months of 1975.

The Action and the Underlying Facts

An action had heretofore been instituted in the United States District Court for the District of South Dakota by Grismer Farms Inc. (hereinafter "Grismer") against "Associated" and several others inclusive of a Corporation known as Mineral Research and Development Corporation (hereinafter "MRDC") to recover for alleged damages allegedly sustained when cattle owned by Grismer were killed and/or injured when fed cattle feed manufactured and distributed by the defendants in that action.

The complaint in the South Dakota action alleges that "as a direct and proximate result of the actions of the defendants [in that action] *jointly and severally* (emphasis supplied) the plaintiffs [in that action] property was destroyed and/or damaged." The allegations are, inter alia, set forth in terms of Joint and several negligence by all the defendants in that action (including Associated and MRDC individually) in the manufacture, process, supply, forward, market, preparation, mixing, promotion of and sale of adulterated livestock feed and trace materials.

The Court in a decision in the South Dakota action (exhibit 58)(60a)* found from the pleadings, affidavits and supporting documents in that action, that Associated processed the material and MRDC sold the material.

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*Matter in parentheses refer to page numbers in Appendix.

While Associated and MRDC had a type of joint venture arrangement, some of the activities pleaded in the South Dakota complaint could only be inferred to Associated acting without the scope of the joint venture. If we take manufacture for example, MRDC did not have any concern or control with regard thereto. The venture between Associated and MRDC did not begin until MRDC received the goods for sale.

Associated, was forced to expend sums of money in the defense of the South Dakota action and to itself defend such action since the Hartford denied liability.

Associated, then brought the action in the Court below for a declaratory judgment as to its two insurers obligations and/or the obligations of either one or both.

The position of Hartford thereto, is, that since there was a joint enterprise it has no liability under an exclusion.

Appalachian contends, that its coverage is excess only and that the exculpatory clause in the Hartford policy does not apply leaving Hartford as the primary insurer. It further contends, that by specific enforsement (Vendors endorsement) liability is upon Hartford.

The Decision Below

The Court below, found that the exclusionary clause in the policy of Hartford as regards joint ventures applied and that the vendors endorsement did not apply in the instant situation.

Statement of Questions Presented

1. Is there an obligation to defend on the part of Hartford?

2. Is the relevant exclusionary clause ambiguous?

3. Does the vendor's endorsement apply?

The Court below answered all three questions in the negative.

ARGUMENT

POINT I

HARTFORD HAS AN OBLIGATION TO DEFEND HEREIN

The complaint in the underlying South Dakota action, clearly seeks recovery if possible against Associated alone. This being the case, there is no question, but that the Hartford has an obligation to defend at the least.

See: *Goldberg v. Lumber Mutual Cas. Co.*, 297 N.Y. 148, 153 (1948)
Doyle v. Allstate Ins. Co., 1 N.Y. 2d 439 (1956)
Sucrest Corp. v. Fisher Governor Co., 83 Misc. 2d 391, 31 N.Y.S.2d 927 (1975)
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Grand Union Co. v. General Accident Fire & Fid. 254 A.D. 274, 4 N.Y.S. 2d 704

What the Court below failed to comprehend, is that there were claims made against Associated that may prove subject to liability insofar as they were made outside the conduct of the joint venture.

The requirement sought to be imposed by the Court below in regards to exclusions that the exclusions be given broad interpretation against the insurer is in error. If there be any doubt as to unmistakeable non-coverage, the ex-

clusionary clause is to be read in favor of the insured (*Sperling v. Great American Indem. Co.*, 7 N.Y.2d 442, 199, N.Y.S. 2d 442; *Sincoff v. Liberty Mutual Fire Ins. Co.*, 11 N.Y.2d 386, 230 N.Y.S. 2d 13).

Also see: *Allstate Ins. Co. v. Skawiniski*, 40 Ill. App. 2d 136, 189 N.E.2d 365.

This is especially so at bar since the exclusionary clause is ambiguous and unclear (See: *Maryland Casualty Co. v. Turner*, 403 F.Supp. 907 (W.D. Okla. 1975). It is well settled law that ambiguous policies are to be resolved in favor of the insured and that all policies be interpreted against forfeiture.

It is submitted that the entire decision of the Court below is based on an superhuman stretching of the meaning and emphasis of the word "conduct" in the exclusionary clause. The clause should rather be interpreted in favor of the insured and coverage.

POINT II

THE VENDORS ENDORSEMENT IN ANY EVENT MAKES ASSOCIATED AN INSURED.

Assuming, for the sake of argument only, that the joint venture exclusion applies, Hartford nevertheless must indemnify Associated by reason of the products liability (vendors) endorsement.

This endorsement provides:

> "It is agreed that the 'Persons Insured' provision is amended to include any person or organization (herein referred to as 'Vendor'), as an Insured, but only with respect to the distribution or sale in the regular course of the Vendor's business of the Named Insured's products. . . ."

The effect of the endorsement is to include the Associated/MRDC joint venture as an insured under the policy. *Thomas J. Lipton, Inc. v. Liberty Mutual Ins. Co.*, 34 N.Y.2d 356, 357 N.Y.S. 2d 705 (1974); *Sears, Roebuck & Co. v. Traveller's Ins. Co.*, 199 F. Supp. 769 (ND Ill., 1961). The endorsement also expressly includes Associated as an insured.

CONCLUSION

The Court below should be reversed and the matter remanded for the entry of a declaratory judgment that the Hartford Policy provides coverage and that the Hartford has an obligation to defend and bear the costs thereof.

Respectfully submitted,

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ABRAMS & MARTIN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 21 day of July 1977 deponent served the within BRIEF upon

Berel, Navarra & Mullen, P.C. and
Paskus, Gordon & Hyman, Esqs.

attorney(s) for

Defendant-Appellee and
Plaintiff-Appellee-Appellant

in this action, at

19 East 9th St., NYC and
733 Third Avenue, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 21 day
of July , 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978